No. 9 & 2

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Supreme Court of the United States,

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OCTOBER TERM, 1901.

NOS. 9 AND 293.

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CHARLES F. CHAMPION,
Appellant,
vs.
JOHN C. AMES, United States Marshal. } No. 9.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

JOHN FRANCIS *et al.*,
Petitioners,
vs.
UNITED STATES. } No. 293.

Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT CHAMPION IN SUPPORT OF CONTENTION THAT THE FEDERAL ANTI-LOTTERY LEGISLATION IS UNCONSTITUTIONAL IN SO FAR AS IT PROHIBITS THE CARRIAGE OR TRANSFER OF LOTTERY MATTER FROM ONE STATE TO ANOTHER BY ANY MEANS OTHER THAN THE MAILS.

WILLIAM D. GUTHRIE,
Of counsel for appellant Champion.

WASHINGTON, October Term, 1901.

[17,474 and 18,111.]

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STATEMENT.

The case of *Champion* v. *Ames*, above entitled, was argued at the last term of this court, being then No. 106 upon the calendar, but a reargument was directed to be heard at the present term at the same time as the

hearing in *Francis* v. *United States*. The two cases present substantially the same question as to the power of Congress to prohibit the carriage of lottery tickets from one state to another. It is, therefore, believed that the brief on behalf of Champion may properly and conveniently be entitled in both cases, particularly as the court ordered the cases to be heard together and as they alike involve the constitutionality of the act of Congress of March 2, 1895 (c. 191, § 1; 28 Stat. 963), generally known as the federal anti-lottery act. The statute is entitled "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States," and section 1 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

The act of Congress contains three separate features of anti-lottery legislation, which were enacted at different times, namely, (1) as to importations from abroad, (2) as to the use of the United States mails, and (3) as to carriage or transfer from one state to another by any means other than the mails. Congress legislated for the first time in 1868 on the subject of suppressing lotteries, and the legislation then and for many years was confined to excluding lottery matter from the United States mails (act of July 27, 1868, 15 Stat. 196; act of June 8, 1872, 17 Stat. 302; act of July 12, 1876, 19 Stat. 90; Rev. Stat. § 3894; act of September 19, 1890; 26 Stat. 465). In 1894 the act was amended so as to prohibit the importation of lottery matter from abroad (act of August 27, 1894; 28 Stat. 509, 549). In 1895 the act was again amended so as to prohibit the carriage of lottery tickets and the transfer of lottery advertisements from one state to another by any means or method (act of March 2, 1895; 28 Stat. 963).

In the *Champion* case, the offense charged in each count of the indictment is the act of delivering in the State of Texas to the Wells-Fargo Express, a carrier, a box containing papers, certificates or instruments purporting to be or represent tickets, chances, shares or interests dependent upon the event of a lottery, etc., for transportation to Fresno, California (record in No. 9, pp. 8–13). The offense charged in the *Francis* case is a conspiracy to cause to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers representing what are known as "policy" slips or tickets (record in No. 293, p. 2). Both cases are con-

fined to the offense of causing lottery tickets or policy slips to be carried from one state to another, and neither case involves any question as to the transfer of lottery advertisements. Although, in the *Champion* case, the lottery tickets purport to be issued by the Pan-American Lottery Company, of Asuncion, in the Republic of Paraguay, the tickets are printed in English, and there is no suggestion in the indictment, evidence or argument that they were "brought within the United States from abroad." Indeed, for the purposes of the prior argument, the government conceded that it might be assumed that the lottery tickets in question were printed in the United States and were not imported from abroad. The *Francis* case, however, presents no element of international commerce or foreign relations or importations from foreign countries. Both cases arise under the third clause mentioned above, covered by the amendment of 1895, which prohibits the causing of lottery tickets to be carried from one state to another by means other than the mails.

The nature of lotteries needs no description. The method of conducting the game of policy involved in the *Francis* case, as shown by the evidence, may, however, be briefly described (106 Fed. Rep. 899). It differs somewhat from the policy game described by Mr. Justice Peckham in *France* v. *United States*, 164 U. S. 676, 678. In the *Francis* case at bar, it was shown that the principal office of the "policy" concern was located in Cincinnati, Ohio; that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other states, at which patrons

or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game chooses three of the numbers from 1 to 78 inclusive, and writes them upon a slip of paper, of which he keeps a duplicate. He hands his list of numbers, with figures to denote the sum paid together with the money to pay for his chance, to the person in charge of the sub-office or agency to be transmitted to the principal office in Cincinnati. When these slips and the moneys are brought to the principal office, the drawing takes place. Successive numbers from 1 to 78 inclusive are put into a wheel, and at each drawing twelve numbers are taken out. If the three numbers on the slip are of the twelve drawn from the wheel, the purchaser wins a prize. If not, he loses. A report of the drawings is sent back to the agency from which the slip came, and, if any purchaser has won a prize or, as it is termed, made a "hit," his slip is returned with the prize to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness Harrison at the Newport office. Of the defendants, Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress.

The only branch of this federal anti-lottery legislation which has heretofore come before this court for adjudication is that relating to the exclusion of lottery matter from the mails. The act of Congress was then sustained

upon the ground that plenary and exclusive power had been vested in Congress by the Constitution to establish post-offices and post-roads and to control as it saw fit the entire postal system of the country. This point was settled by the decisions of the court in *Ex parte Jackson*, 96 U. S. 727, 732, and *In re Rapier*, 143 U. S. 110, 133. Although the power of Congress to forbid the carriage or transfer of lottery tickets or advertisements from one state to another by means other than the mails has not yet been decided by this court, nevertheless in *Ex parte Jackson*, *supra* (96 U. S. 727, 735), Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; *but further than this its power of prohibition cannot extend.*"

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller stated that the *Jackson* case had held "that the transportation in any other way of matters excluded from the mails would not be forbidden." The point was presented to the court in *France* v. *United States*, 164 U. S. 676, 683, but was not decided.

The power of Congress to exclude importations of lot-

tery matter from abroad and the power to prohibit the carriage and transfer of lottery tickets and advertisements from one state to another have, therefore, not yet been determined or upheld by the court. The cases now at bar distinctly present the latter question, as to whether or not Congress may prohibit the carriage of lottery tickets from one state to another by any means other than the United States mails. The appellants contend that lotteries and dealings in lottery tickets or policy slips are not commerce within the true meaning of that term as used in the Constitution of the United States; that the prohibition and suppression of lotteries is a subject exclusively within the scope of the police power reserved to the states, and that it is for each state to regulate, to permit or to prohibit lotteries as the local policy may dictate. The Government contends, on the other hand, that lotteries constitute a branch of interstate commerce, and that the power to regulate commerce includes the power to prohibit and suppress interstate intercourse in respect of lotteries, or, to use the language of the government's brief, "to legislate lotteries out of existence" (p. 7).

A suggestion was made on the prior argument that the state laws had been found to be ineffective for the suppression of lotteries, and that this court should, therefore, strain to sustain any federal legislation which was necessary or expedient to cope with the assumed evil. This is a suggestion which, even if true, should not be pressed. It is confidently submitted that present expediency or public necessity cannot expand the commerce clause or change its original scope and meaning. If the suppression of lotteries was exclusively within the pro-

vince of the police power of the states according to the true interpretation of the Constitution, as understood at the time it was adopted, no present expediency or necessity can justify extending the commerce clause to cover it. Moreover, as matter of fact, every act charged in these indictments is covered by adequate legislation in Texas, California and Illinois in the one case[1] and Kentucky and Ohio in the other case.[2] Champion could have been indicted in Texas or California for the overt act charged in the indictment in his case, and Francis *et al.* could have been indicted under the laws of Kentucky or Ohio. If the local laws be enforced, the states have ample power to prohibit and suppress lotteries. Besides, any suggestion that the local lottery laws may not be enforced in some states or that the officers charged with enforcing them may be derelict or corrupt, even if true, affords absolutely no legitimate argument in support of federal legislation. If such an argument could be listened to, it would, in its last analysis, vest in Congress power to legislate in all criminal matters whenever the state laws were not duly enforced, as to any acts or transactions arising from or connected directly or indirectly with intercourse among the inhabitants of the several states.

I.

Although the clause of the federal anti-lottery act which prohibits importations of lottery tickets and ad-

[1] See Rev. Stats., Texas, 1895, Arts. 373-378; Penal Code, California, 1899, §§ 319-326; Rev. Stats., Illinois, Myers, 1895, §§ 180-185, p. 481.

[2] See Gen. Stats., Kentucky, 1899, §§ 1314-1317, 2573-2580; Bates Ann. Stats., Ohio, Third ed., §§ 6929-6931.

vertisements from abroad is not now presented for adjudication, nevertheless a discussion of the power of Congress over foreign relations and imports will be pertinent in juxtaposition to the power over interstate commerce. The idea that the power to prohibit importations of lottery matter from abroad would be necessarily denied if the interstate feature of the federal anti-lottery legislation now in question were not upheld, seems to have unduly impressed or influenced the court below in the *Francis* case, if, indeed, the idea did not mislead it (record in No. 293, p. 365; 106 Fed. Rep. p. 903).

The whole power to regulate every form of relations and intercourse with foreign countries resides in the sovereign national power created by the Constitution of the United States;[1] and every manner of intercourse in its broadest signification, whether commercial intercourse or otherwise, is to be regulated, permitted or prohibited by Congress alone.

The source and scope of this power to regulate international commerce are, in their very nature, essentially different from the source and scope of the power to regulate domestic commerce. In the case of international commerce, there is no limitation whatever upon the power of Congress and no implied or reserved power in the states. In the case of internal or interstate commerce, the only power Congress exercises is that expressly delegated by the states, and that power is hedged in and circumscribed by the local police and municipal powers expressly reserved to the states.

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[1] *Head Money Cases*, 112 U. S., 580, 591.

When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but likewise on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. But when considering a statute regulating internal or interstate commerce, the exercise of power in the given case is limited to that expressly granted and must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively, or to the people"[1]—considerations and limitations which have no weight in regulating foreign affairs.[2] In regulating what is generally termed international commerce and intercourse, Congress must, of necessity, have ample power to prevent the introduction of foreign lottery matter, and, in order to render such inhibition effective, it must have power to prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or carriage or transfer of smuggled imports or contraband goods even from point to point within a state. But many of the considerations which are of a national character and which arise between the United States, as a nation, and foreign nations wholly disappear when interstate relations are contemplated.

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[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9, pp. 250, 258, 262.

Thus, Mr. Justice McLean, in his concurring opinion, in *Groves et al.* v. *Slaughter*, 15 Peters 449, 505, said:

> "Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property. Here is an ample range, extending to the remotest seas where the commercial enterprise of our citizens shall go, for the exercise of this power.
>
> The power to regulate commerce among the several states is given in the same section, and in the same language. But it does not follow that the power may be exercised to the same extent. . . .
>
> The United States are considered as a unit, in all regulations of foreign commerce. But this cannot be the case where the regulations are to operate among the several states. The law must be equal and general in its provisions. Congress cannot pass a non-intercourse law, as among the several states; nor impose an embargo that shall affect only a part of them."

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion need not be challenged in the slightest degree. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon

foreign ships or manufactures,[1] we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much a part of the sovereign's prerogative as is the right to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty under the treaty power has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are expressly forbidden to enter into any form of treaty.[2]

The power to regulate commerce among the several states, it is true, is given in the same section and in the same language as the power to regulate foreign or international commerce, but it by no means follows that the scope of the power is the same in both cases or that it may be exercised to the same extent.[3] The same terms in relation to separate subjects may, of course, differ in scope and signification.

II.

The point in this case, as to the power of Congress to prohibit the carriage or transfer of lottery matter

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

[2] Section 10 of Article I. of the Constitution of the United States.

[3] *Groves et al.* v. *Slaughter*, 15 Peters, 449, 505.

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from one state to another must, therefore, be discussed and determined as a question of interstate commerce pure and simple, separated from those considerations which relate only to importations from abroad, and which are not common to international and interstate relations.

The appellants contend that a lottery ticket or advertisement is not an article of commerce, that the conduct of lotteries and the sale of lottery or policy tickets is not commerce; that the protection of the people of the respective states from the evils of lotteries should be left where it was the intention of the framers of the Constitution to leave all such police regulations, namely, in the respective states, to regulate, to permit, or to prohibit, and that the power to regulate commerce never was intended to authorize Congress to say what shall or shall not be carried from state to state, without regard to the commercial character of the matter carried. Indeed, if the given subject be not commerce, where does Congress derive any power to regulate it?

In so far as the law now under consideration is aimed against the lottery ticket or policy slip, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local police regulations of either place. Lotteries, wherever found, are not interstate commerce, but at most interstate wagering, such as insurance and other forms of speculation or gambling. It is true that lotteries, which were once extensively engaged in, have gradually fallen into disrepute and become

illegitimate, and that the states, in the exercise of their police powers, have one by one prohibited them, and in aid of this prohibition have passed laws forbidding the introduction of advertisements and papers from other states. But the gradual condemnation of lotteries did not make them interstate commerce if it was not so before, or diminish the power of the respective states to permit, regulate or prohibit them. If the change had any effect, it must have been the reverse.

This court has frequently decided that the police power of the states was not surrendered when the Constitution conferred upon Congress the general power to regulate commerce with foreign nations and among the several states[1]; and it has also decided that lotteries are proper subjects for the exercise of this state police power, and that grants of lottery privileges are not within the protection of the contract clause.[2] The commerce clause in the past, when lotteries were generally favored, was never invoked to protect from state legislation or prohibition persons dealing in lottery tickets or policy slips. There are innumerable forms of gambling and speculation current among the people of the respective states, and although these may constitute interstate gambling or crimes committed partly in one state and partly in another, they constitute, in no proper sense of the term, any form of interstate commerce and as such within the jurisdiction of Congress.

It may be admitted that, if *commerce* means

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[1] Mr. Justice Harlan in *Patterson* v. *Kentucky*, 97 U. S. 501, 503, 505.

[2] *Stone* v. *Mississippi*, 101 U. S. 814, 818; *Douglas* v. *Kentucky*, 168 U. S. 488, 496.

intercourse in the broadest sense of that term, then the legislation in question is within the power delegated to Congress.[1] But if the word *commerce* was not intended to include all the significations and range of the word *intercourse*, then it will be assumed that no argument would be patiently listened to which sought to urge upon this court the proposition that it is within the judicial province to interpolate or substitute in place of *commerce* the word *intercourse*, which the framers of the Constitution, in their wisdom, saw fit not to use or insert. The word *intercourse*, in one of its significations or aspects, may well briefly describe commerce; yet, obviously, all intercourse is not commerce. Nor is there any warrant for the contention that Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, or this court in later cases, defined the word *commerce* as embracing all the meanings of the word *intercourse*. What has been ruled is, not that *commerce* is the equivalent or synonym of *intercourse*, but that commerce is synonymous with "*commercial* intercourse," which no one could dispute. As Chief Justice Marshall said in that famous case (p. 189):

> "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that

[1] See remarks of Chief Justice Taney in note to *Passenger Cases*, 7 How. at p. 492.

it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial* intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on *that* intercourse."

In considering these important questions as to the extent and limits of the power of Congress to create and punish crimes, it is always necessary to bear distinctly in mind that the people of the United States, when adopting the Federal Constitution, saw fit to withhold and deliberately "reserved to the states respectively or to the people" many objects which would have been appropriate for federal legislative action. The practical experience of our own times may lead us to deplore the fact that unreasonable fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight of broader-minded statesmen and philosophers who would have extended and not curtailed the powers of the national government. But the general power to punish for crimes in connection with many matters which were or might become of national interest was intentionally withheld. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and suppression of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. All must regret the unfounded fear and the

unreasoning jealousy which withheld from the national government powers that to-day could be exercised with immense benefit to the people of the whole country. It was then, and may now be, most desirable that lotteries, insurance, frauds,[1] negotiable instruments, divorces, the manufacture of explosives and inflammable oils,[2] the inspection of slaughtering and packing,[3] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects would tend to simplify the administration of justice, to introduce certainty into our systems of jurisprudence, to accommodate interstate intercourse, and to strengthen and solidify us as one people. But the power was not conferred; and conservatism has thus far restrained us from amending the Constitution. Until it is amended, the courts must enforce the fundamental law as it is and not as we might wish it had been. However desirable or however necessary federal power in any case may seem to be, if it was not expressly conferred upon Congress, it cannot be read into the Constitution by legislative declaration or by judicial decree. The Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[4] It is to-day what it was when Hamilton and Madison and Marshall wrote and argued in its support. The surrounding circumstances have changed, usages of life and trade and modes of thinking have changed, the manners and morals and ideas of

[1] *United States* v. *Fox*, 95 U. S. 670.

[2] *United States* v. *Dewitt*, 9 Wall. 41.

[3] *United States* v. *Boyer*, 85 Fed. Rep. 425.

[4] See *Ex parte Milligan*, 4 Wall. 2, 120; *In re Debs, Petitioner*, 158 U. S. 564, 591.

the functions and end of government and conceptions of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions of society are evolving; systems of municipal law are being altered incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when it was adopted. We are not at liberty to give the provisions of the Constitution new meanings because of considerations of expediency. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and necessarily detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious, but worthy of encouragement. Revenue for the support of the state governments, of colleges and churches and other public enterprises was at that time derived from lotteries, and Congress itself sanctioned lotteries. Was it the intention or understanding of the people of the respective states in adopting the Constitution to grant to the federal government the power to prevent the states from using lotteries among themselves as a source of state revenue, if they saw fit so to do? If the present question

[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is to-day,[1] and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void because not a regulation of commerce and because trenching upon the police power reserved to the states.

It was contended by the Government that, as Congress may regulate express companies and other interstate carriers as instrumentalities of commerce, the power is necessarily implied to determine what they shall and what they shall not transport; in other words, that Congress has exactly the same power over these instrumentalities of commerce that it has over the United States mails. Let this contention be upheld and it would follow that Congress could prohibit the transfer from state to state of any class of documents, of newspapers, periodicals, insurance policies, municipal bonds, notes, contracts, and everything in fact that is used in interstate intercourse among the people of the respective states. It is submitted that no such broad and all-pervading federal power was intended to be conferred in the power to regulate commerce.

An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of papers which do not in their nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to

[1] Thayer, Cases on Const. Law, vol. iv., p. 1774.

carry out effectively the express grant of the power to regulate interstate commerce. The suggestion has been made that, if the present legislation be not sustained, Congress would be denied the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures. The answer is that all these constitute primarily articles of commerce and that, having the power to regulate commerce in such commercial articles, Congress may prohibit the carriage or transfer of such as will tend to injure the community. They come within the range of the power of Congress, because they are commercial in their nature. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of articles of commerce should or should not be compulsorily brought into a state, and thus to protect the people, for otherwise there could be no protection. Having power to compel, it may safeguard. It is sometimes said that diseased animals or infectious goods or obscene literature do not constitute articles of commerce, and that their transport may be prohibited on that ground, but this is an incorrect use of terms. If they do not constitute articles of commerce, where did Congress find the power to exclude or regulate them? It is solely because they are inherently articles of commerce, although injurious and harmful articles of commerce, that Congress may say that it will regulate interstate commerce in them. Whatever may be the definition of lexicographers of the term "regulate," the reasonable and only true interpretation

of the Constitution is that when the power to regulate interstate commerce was granted to Congress, it included the power to determine what articles of commerce should or should not have the advantage of free and untrammeled transport or sale, notwithstanding the laws of any state. It would, however, be stretching the language to an extreme which, it is submitted, the court has not sanctioned, to hold that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any form or sense.

As was said by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 82, 96:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

The government urged on the prior argument that because most lottery tickets are now made payable to bearer and pass by delivery, the decision might be placed upon the ground that lottery tickets were commercial commodities. But this contention involves the implication that such transactions would change their essential nature and the power of Congress cease if the mode of doing business were altered and lottery tickets were no longer made transferable by delivery but were confined to the indi-

vidual first purchasing, with whom a personal contract was made! The policy slips that Francis caused to be carried from Covington to Cincinnati were not negotiable or transferable by delivery. Such a ground of decision would be entirely too narrow, and, moreover, would be very easily circumvented. It would not reach what of all things is most important, namely, the lottery and policy circulars and advertisements. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is done on the race track), and then transfer from state to state only the advertisements and circulars and the notices of drawings.[1]

Insurance policies on goods in transit usually are not personal, but run to whom it may concern, or in favor of the owner of the property, and the title to that property passes by delivery of the bill of lading or warehouse receipt. The fact that an insurance policy, or insurance ticket as it is sometimes called, passed by delivery with the delivery of the bill of lading, would not render it a commercial commodity within the Constitution or bring insurance within the scope and protection of the commerce clause.

The argument that lottery tickets are commodities because they pass by delivery is, therefore, unsound, and the suggestion does not advance us in the solution of this far-reaching and important constitutional point. This case must be decided on far broader considerations than the narrow and accidental feature of title by delivery.

Congress cannot, of course, conclusively determine

[1] *France* v. *United States*, 164 U. S. 676, 682.

what is or what is not an article of commerce. That inquiry is essentially a judicial question. Otherwise, Congress could determine for itself the extent and limits of its own powers. A legislative fiat cannot make that commerce or a commercial commodity which in its essence and nature is not such. A transaction which in its nature or analysis is not commercial, cannot become so merely because Congress declares it commerce. Congress could not, for example, declare insurance to be commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. Nor could Congress, under the guise of regulating interstate commerce, compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state police laws prohibiting the sale of such tickets. Surely a lottery agent indicted in New York under a statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause.

A conviction under the statute of Virginia for selling lottery tickets for the national lottery authorized by the act of Congress of May 4, 1812, was sustained in the case of *Cohens* v. *Virginia*, 6 Wheat. 264. The state statute in that case forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal gov-

ernment of the state. Yet if the lottery tickets had been deemed articles of commerce, the Virginia act would obviously have been invalid as a regulation of commerce.[1]

A lottery contract is, in all its aspects, of the same nature as an insurance contract, which is an analogous form of wagering contract. They are both aleatory. An aleatory contract is one whose fulfillment depends on a future and uncertain event. Such are contracts of annuity, insurance, lottery and other forms of wagering. It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[2]

In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn, or your ship be lost, we will pay you so much." The lottery company similarly says, "If a certain number be drawn, we will pay you so much."

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the issuing of insurance policies in New York and sending them to Virginia, to be there delivered to the insured on payment of premium, was

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[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

[2] Pothier's Obligations, Evans' Transl., vol. I., pp. 9–10; Louisiana Civil Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230–232; May on Insurance, (4th ed.), vol. 1. p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.), pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery policy or ticket as to a policy of insurance, viz.:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

> "Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce.

> The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . . .
>
> The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

> "Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states?
>
> That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall. 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'
>
> We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.' And we add, or against the uncertainty of man's mortality."

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in these three well considered cases,[1] this court has felt constrained to hold that insurance was not commerce and an insurance contract not a commercial transaction within the true meaning of the Constitution, for the reasons stated, then it must logically follow that lottery tickets, which are but another form of aleatory contracts, and relate in no sense even remotely to commercial commodities, are not commercial transactions. The court appreciated in *Hooper* v. *California*, 145 U. S. 648, 653, that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance, should be free as part or an incident of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. In that case, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, whilst it was insisted on behalf of the state of California that insurance was not commerce. The briefs on file show this conclusively. The question was thus distinctly presented, and the court, as above stated, felt constrained to hold that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse, as is also an immigrant agency.[2] Significant, too, is it that in the dissenting opinion of Mr. Justice Harlan in the *Hooper* case, there is not the slightest

[1] Reviewed again in *Williams* v. *Fears*, 179 U. S. 270, 277.

[2] *Williams* v. *Fears*, 179 U. S. 270, 273.

suggestion that insurance did constitute commerce. The dissent was placed on an entirely different ground.

The analogy between the business of insurance and lottery as understood and classed at the time of the adoption of the Constitution is most strikingly confirmed by the extract from Jefferson's writings submitted in the brief of the Government at p. 77, in which Jefferson is quoted as saying:

> "There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases."

If, therefore, insurance policies, although connected with property which is the subject matter of interstate or foreign commerce, be not commerce within the true meaning of the commerce clause in the Constitution of the United States, it must follow that the other forms of aleatory contracts, such as lottery tickets or policies, do not come within the scope of that clause.

This court having definitely settled that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to regulate insurance or to forbid the carriage or transfer of insurance policies or tickets or other printed matter from state to state by agencies other than the mails?

Would it not be held that any such statute was not a regulation of interstate commerce in any proper meaning of the term, because insurance was not commerce, and that the power to regulate insurance had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the subject of insurance, particularly in connection with vessels engaged and commodities used in interstate commerce[1]; but that consideration of expediency cannot draw to Congress a subject not delegated to it by the Constitution.

This feature of insurance also presents quite a striking example of the force of the suggestion heretofore made as to the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress, by treaty or otherwise, to enact that foreign insurance companies should not be permitted to enter the United States by their agents or to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would have no power whatever to regulate the business of interstate insurance.

It has been held by this court in the case of *In re Rahrer*, 140 U. S. 545, that Congress may, as to any article of commerce, ordain that as soon as it comes within the state, even in its original package, it shall become subject to the operation of the police laws of that state together with other similar property within the borders of the state. It has been

[1] *Hooper* v. *California*, 155 U. S., 648.

suggested that this decision involves the proposition that Congress can practically prohibit interstate commerce in any article by permitting the states to interfere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. It must be evident that there is a vast difference between an act of Congress which declares that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another: the one would freely permit transportation and fully recognize the reserved powers and rights and wishes of the state; the other would absolutely prevent transportation and interfere with the police power of the states to permit or to prohibit. One state may desire to encourage what another wishes to prohibit; in one locality a certain article, *e. g.* intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the *Rahrer* case, 140 U. S. 545, shows that it was by no means the idea in that opinion that Congress might prohibit all interstate traffic in liquors. On the contrary, as Mr. Chief Justice Fuller said of the legislation then in question (at pp. 561 and 564):

> "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or

> to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

It must be quite evident that any attempt by Congress to prohibit interstate traffic in liquor, notwithstanding the wishes of the various states and their local preferences, would be a departure which would cause much astonishment and opposition, whilst the legislation discussed in the *Rahrer* case involved the exercise by Congress of a power which recognizes to the fullest extent the jurisdiction of any state to permit or prohibit, according to its local policy.

In connection with this point, a legislative episode of 1836 may be mentioned in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[1] In many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[2] The general impression which prevailed in the South was that these regulations applied even to the United States postmast-

[1] 49 Niles' Register, 228.

[2] North Carolina, 1830, Laws, vol. 14. p. 10, and Maryland, 1831; 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

ers, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[1] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails all anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, and that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[2] Buchanan placed his support of the bill on broader grounds, and thought that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incendiary.[3] The opposition to the bill was based upon

[1] 48 Niles' Register, 447–448; 49 Niles' Register, 7–8.

[2] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

[3] " " " App. 454.

constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts [1] and by Webster.[2] On the 8th of June the bill was rejected by a vote of 25 to 19.[3]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that if Congress could not regulate this matter indirectly through the mails it could not regulate it at all; and no suggestion was ever made that such a bill could be passed under the commerce clause.

CONCLUSION.

For these reasons, it is submitted that that portion of the act of Congress of March 2, 1895, which prohibits the causing of lottery tickets to be carried from one state to another should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of lotteries must be held to be within the police power of the respective states to permit or prohibit as local public policy may dictate.

Washington, October Term, 1901.

WILLIAM D. GUTHRIE,
Of counsel for appellant Champion.

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[1] Cong. Globe, 24th Cong., 1st Sess., 348.
[2] " " " App. 453.
[3] " " " 539.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

NOS. 2 AND 80.

CHARLES F. CHAMPION, *Appellant,*

vs.

JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

No. 2.

JOHN FRANCIS *et al.*, *Petitioners,*

vs.

UNITED STATES.

Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

No. 80.

REVISED BRIEF FOR APPELLANTS IN SUPPORT OF CONTENTION THAT THE FEDERAL ANTI-LOTTERY LEGISLATION IS UNCONSTITUTIONAL IN SO FAR AS IT PROHIBITS THE CARRIAGE OF LOTTERY TICKETS FROM ONE STATE TO ANOTHER BY ANY MEANS OTHER THAN THE MAILS.

WILLIAM D. GUTHRIE,
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[17,474 and 18,111.]

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STATEMENT.

The case of *Champion* v. *Ames*, above entitled, was first argued at the October term, 1900, but a reargu-

ment was directed to be heard at the October term, 1901, at the same time as the hearing in *Francis* v. *United States*. The two cases were argued in October, 1901, and at the commencement of the present term were ordered to be again set for reargument as one case before a full bench.

The two cases present substantially the same question as to the power of Congress to suppress lotteries by prohibiting any person from causing lottery tickets to be carried from one state to another, and alike involve the constitutionality of a provision in the act of Congress of March 2, 1895 (c. 191, § 1; 28 Stat. 963), generally known as the federal anti-lottery act. The statute is entitled "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States," and section 1 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by

imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

The act of Congress contains three separate features of anti-lottery legislation, which were enacted at different times, namely, (1) use of the United States mails, (2) importations from abroad, and (3) causing lottery tickets to be carried from one state to another by any means other than the mails. The Congress legislated for the first time in 1868 on the subject of suppressing lotteries, and the legislation then and for many years was confined to excluding lottery matter from the United States mails (act of July 27, 1868, 15 Stat. 196; act of June 8, 1872, 17 Stat. 302; act of July 12, 1876, 19 Stat. 90; Rev. Stat. §3894; act of September 19, 1890, 26 Stat. 465). In 1894 a provision was incorporated in the tariff law prohibiting the importation of lottery matter from abroad (act of August 27, 1894, 28 Stat. 509, 549). In 1895 the act now in question was passed, supplementing the provisions of the prior acts so as to prohibit the act of causing lottery tickets to be carried and lottery advertisements to be transferred from one state to another by any means or method (act of March 2, 1895, 28 Stat. 963). Reference to the purpose of suppressing lottery traffic first appeared in the title of the act of 1895.

In the *Champion* case, the offense charged in each count of the indictment is the act of delivering in the state of Texas to the Wells-Fargo Express, a carrier, a box containing papers, certificates or instruments purporting to be or represent tickets, chances, shares or interests dependent upon the event of a lottery, &c., for

transportation to Fresno, California (record in No. 2, pp. 8–13). The offense charged in the *Francis* case is a conspiracy to cause to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers representing what are known as "policy" slips or tickets (record in No. 80, p. 2). Both cases are confined to the offense of causing lottery tickets or policy slips to be carried from one state to another, and neither case involves any question as to the transfer of lottery advertisements. Although, in the *Champion* case, the lottery tickets purport to be issued by the Pan-American Lottery Company, of Asuncion, in the Republic of Paraguay, the tickets are printed in English, and there is no suggestion in the indictment, evidence or argument that they were "brought within the United States from abroad." Indeed, for the purposes of the prior arguments, the government conceded that it might be assumed that the lottery tickets in question were printed in the United States and were not imported from abroad. The *Francis* case, however, presents no suggestion of international commerce or foreign relations or importations from foreign countries. Both cases arise under the third clause mentioned above, covered by the amendment of 1895, which prohibits the causing of lottery tickets to be carried from one state to another by any means other than the mails.

The nature of lotteries needs no description. Although in general use and favored at the time the Constitution was adopted and for many years afterwards, they have now generally grown into disrepute and though not legally *mala in se* they are *mala prohibita*.[1] The

[1] *Stone* v. *Mississippi*, 101 U. S. 814, 821.

nature or method of conducting the game of policy involved in the *Francis* case, as shown by the evidence, may be briefly described (106 Fed. Rep. 899). It differs somewhat from the policy game described by Mr. Justice Peckham in *France* v. *United States*, 164 U. S. 676, 678. In the *Francis* case, now before the court, it was shown that the principal office of the "policy" concern was located in Cincinnati, Ohio, that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other states, at which patrons or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game would choose three of the numbers from 1 to 78 inclusive, and write them upon a slip of paper, of which he kept a duplicate. He would hand his list of numbers, with figures to denote the sum paid, together with the money to pay for his chance, to the person in charge of the sub-office or agency to be transmitted to the principal office in Cincinnati. When these slips and the moneys were brought to the principal office, the drawing took place. Successive numbers from 1 to 78 inclusive were put into a wheel, and at each drawing twelve numbers were taken out. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win a prize. If not, he lost. A report of the drawings was sent back to the agency from which the slip came, and, if any purchaser had won a prize or, as it is termed, made a "hit," his slip was returned with the prize to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness

Harrison at the Newport office. The defendant Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress.

ASSIGNMENT OF ERRORS.

The courts below erred in sustaining the prohibitory legislation in question because—

1. The suppression of lotteries is not an exercise of any power committed to the Congress by the Constitution of the United States, and is, therefore, in contravention of Article X of the Amendments, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

2. The sending of lottery tickets or policy slips does not constitute or evidence any transaction belonging to interstate commerce and is not within the scope of the power of the national government to regulate commerce among the states.

3. The power to regulate lotteries, and to permit or prohibit the sale of lottery tickets, is exclusively within the jurisdiction of the police power reserved to the states.

I.

It cannot be reasonably doubted that the intention and purpose of Congress, in the legislation now before the court, was to suppress lotteries. There is no necessity to resort to the proceedings in Congress in which this purpose was openly avowed, for it appears on the face of the act itself expressly in its title and impliedly in its natural and reasonable effect. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 462; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 268; *United States* v. *Fox*, 95 U. S. 670, 672; *Minnesota* v. *Barber*, 136 U. S. 313, 320. Yet hitherto no one has asserted that Congress has power to suppress lotteries any more than it has power to suppress insurance or speculation or other business between residents of different states not relating to interstate commerce. The suppression of lotteries or of any other harmful business is essentially an exercise of the police power exclusively within the domain of and expressly reserved to the several states. As Mr. Chief Justice Fuller said in *In re Rahrer*, 140 U. S. 545, 554:

> "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. . . . In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the National Government."

And again, in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.
>
> It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police."

Yet, on behalf of the United States it is now urged, in support of the legislation before the court, that there is a federal police power of the broadest scope to be administered by Congress in its absolute discretion, and not reviewable by the courts. Thus, in the revised brief of the United States, after submitting the proposition that the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody across state lines, the following is stated (p. 53):

> "The power to prohibit exists for any purpose referable to the legitimate objects of govern-

ment, such as the preservation of health, the protection of morals and the safety of life."

It is submitted that no such absolute power in respect of police regulations was ever intended to be vested in Congress. On the contrary, it is well-settled that there is no such thing as a federal police power except in respect of those specific subjects delegated to Congress, such as treason, counterfeiting, piracies and felonies on the high seas and offences against the laws of nations. Of course, in exercising its delegated powers, Congress may create crimes and add the sanctions without which law exists but in name. Authority to legislate on a given subject necessarily includes authority to punish any one by whom the laws so made are violated. But this incidental power to enforce its legislation cannot extend the jurisdiction of Congress to subjects not delegated to the national government or support legislation not "necessary and proper for carrying into execution" the power to regulate commerce or any other delegated power. In the case at bar, the prohibition in question, it is true, may well be deemed "necessary and proper" for the suppression of lotteries, but it has no relation to interstate commerce and, therefore, is not "necessary and proper for carrying into execution" the power to regulate commerce among the states or for accomplishing any result connected therewith. And as Chief Justice Marshall said in *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 423:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this

> tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Mr. Justice Catron in *The License Cases*, 5 How. 504, 600, stated the true rule governing this class of cases, as follows:

> "And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *The State of Maryland* and *New York* v. *Miln*."

And in the *Trade-Mark Cases*, 100 U. S. 82, 96, Mr. Justice Miller said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

The question now at issue being the power of Congress to regulate by prohibition the sending of lottery tickets from one state to another, it is material to inquire whether or not the nature of lottery tickets is such that they may be regarded as articles of commerce and hence of interstate commerce when sent or carried across state lines. At most, they are mere evidences of contracts made wholly within the boundaries of a state, which contracts are valid or invalid according to the

municipal law of the state where made or attempted to be enforced. If the given subject thus attempted to be regulated be not commerce, it is not easy to perceive whence Congress derives the power to regulate it. Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially judicial. Otherwise, Congress could determine for itself the extent and limit of its own powers and enlarge them at will. As Chief Justice Taney said in *The License Cases*, 5 How. 504, 574:

> "The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the states, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution."

A legislative fiat cannot make that a commercial commodity which in its essential nature is not such. A transaction which is not commercial in its nature, cannot become so merely by the declaration of Congress. For example, Congress could not, under the guise of regulating interstate commerce, declare insurance to be interstate commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. For the same reason, it has always been assumed that Congress could not compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state police laws prohibiting the sale of such tickets. Surely, lottery agents indicted in New

York under the statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause. At any rate, no such proposition has ever been advanced or suggested until the present attempt to support the act of Congress.

A lottery ticket, like an insurance policy, a bill of exchange, a promissory note, a contract for sale of land or merchandise, whether negotiable or otherwise, is in itself only the evidence of a contract made or to be made between residents of different states. Until a transaction is had, it is meaningless and worthless. When sold, it represents nothing of value in itself but merely a means of enforcing a contract right. The subject-matter represented by the lottery ticket, the insurance policy, the bill of exchange or the promissory note, is a contractual relation between individuals which must be created and regulated under the laws of the state where the contract is made or where it is to be performed, just as any other contract between residents of different states, unless directly relating to interstate commerce.

In *Ex parte Jackson*, 96 U. S. 727, 735, Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of news-

papers and pamphlets, when not sent as merchandise; *but further than this its power of prohibition cannot extend.*"

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller stated that the *Jackson* case had held "that the transportation in any other way of matters excluded from the mails would not be forbidden." The question at bar was presented in *France* v. *United States*, 164 U. S. 676, 683, but was not necessary to the decision and was left undecided.

In the case of *Cohens* v. *Virginia*, 6 Wheat. 264, the nature of lotteries came before this court for adjudication, and a conviction under a statute of Virginia for selling lottery tickets for the national lottery authorized by the act of Congress of May 4, 1812, was sustained. The state statute forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal government of the state. Yet, if the lottery tickets had been deemed articles of commerce, obviously the Virginia act would have been invalid as a regulation of commerce.[1]

A lottery ticket, in all its aspects, is of the same nature as an insurance policy, which represents an analogous form of wagering contract. They are both aleatory, because in each case the contract is one whose fulfillment depends upon a future and uncertain event.

[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

Such are contracts of annuity, insurance, lottery and other forms of wagering. It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[1]

In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn, or your ship be lost, we will pay you so much." The lottery company similarly says, "If a certain number be drawn, we will pay you so much."

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the issuing of insurance policies in New York and sending them to Virginia, to be there delivered to the insured on payment of premium, was not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery or policy ticket as to a policy of insurance, viz.:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value

[1] Pothier's Obligations, *Evans' Transl., vol. I, pp. 9-10; Louisiana Civil* Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230–232; May on Insurance, (4th ed.), vol. 1, p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.), pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

"Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . . .

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

> "Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states?
>
> That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall. 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'
>
> We omit the reasoning by which that is demonstrated, and will only repeat, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" And we add, or against the uncertainty of man's mortality."

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in these three well considered cases, this court has held that insurance was not interstate commerce and an insurance contract not a commercial transaction within the true meaning of the Constitution, for the reasons stated, then it must logically follow that lottery contracts, which are but another form of aleatory contracts, and relate in no sense even remotely to commercial commodities, are not commercial transactions. In *Hooper* v. *California*, 155 U. S. 648, 653, the

court appreciated that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance, should be free as a part or an incident of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. The act of sending insurance policies from one state to another was relied on as bringing the transaction within the commerce clause. In that case, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, because connected with the subject matter of interstate or foreign commerce, whilst it was insisted on behalf of the State of California that insurance was not commerce. The briefs on file show this conclusively. The question was thus distinctly presented, and the court, as above stated, held that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse.

Significant, too, is it that in the dissenting opinion in the *Hooper* case, there is not the slightest suggestion that insurance or the sending of policies from one state to another would constitute commerce within the true meaning of the Constitution.

The government seeks to distinguish these insurance cases on the ground that the transaction was not interstate commerce, because the agent of the foreign insurance company negotiated the contract of insurance in the state where the contract was to be finally completed and the policy delivered. No such distinction, however, is inferable from the language of any of

the insurance cases, and, certainly, it will not be claimed that it was intended to overrule *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, where it was held that "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." *Hopkins* v. *United States*, 171 U. S. 578, 601. In *Collins* v. *New Hampshire*, 171 U. S. 30, 32, a package of oleomargarine was negotiated and sold by a resident agent of a foreign corporation, and the transaction was held one of interstate commerce. In *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 46, it was made clearer, if possible, that, had the business of interstate insurance been interstate commerce, the law in question would have been held unconstitutional. Referring to *Hooper* v. *California*, the court said:

> "All preceding cases were cited, and it was assumed as settled 'that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state.' And the exception to the rule was stated to be 'only cases where a corporation created by one state rests its right to enter another and engage in business therein upon the federal nature of its business.'
>
> This exception was recognized in the case at bar, and the business of the plaintiff in error of a federal nature excluded from the operation of the judgment."

The business of a "federal nature" so excluded was that of transporting petroleum into Texas from other states.

In *Williams* v. *Fears*, 179 U. S. 270, 276, the State of Georgia taxed an emigrant agent whose

business was the hiring of persons to be sent without the state, or, in other words, the causing them to be carried from one state to another, and the question was whether that business was or was not interstate commerce. The court held that it was not, relying principally upon the insurance cases, *supra*, and quoting with approval at length from the language of Mr. Justice White in the *Hooper* case.

The logical result of the contention of the government is that the lottery business is so essentially different from insurance, that a foreign corporation engaged solely in conducting interstate lotteries could not be excluded by any state. It is, perhaps, unnecessary to remind the court that the contrary has, in substance, been repeatedly ruled in the cases which uphold the power of the states absolutely to prohibit lotteries of any kind.

It having been definitely settled by this court that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to forbid the carriage or transfer of insurance policies or tickets from state to state as a regulation of interstate commerce? Would it not be held that the object of such a statute was not to regulate interstate commerce at all in any proper meaning of the term, because insurance transactions were not interstate commerce, although incidents of commerce, and that the power to regulate insurance had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the subject of insurance, particularly in

connection with vessels engaged and commodities used in interstate commerce; but that consideration of expediency cannot draw to Congress a subject not delegated to it by the Constitution.

In so far as the law now under consideration is aimed against the lottery ticket or policy slip, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local municipal laws and police regulations of either place. Lotteries, wherever found, are not interstate commerce, but at most interstate wagering, such as insurance and other forms of speculation or gambling. It is true that lotteries, which were once popular and extensively engaged in, have gradually fallen into disrepute and have become the subject of prohibition by most of the states. But the gradual prohibition of lotteries under state police powers did not make them interstate commerce, or diminish the power of the respective states to permit, regulate or prohibit them. The time may come when an ordinary contract of insurance will be as unpopular as the contract evidenced by the lottery ticket. Would it then be possible, under the present Constitution, to sustain the power of Congress to forbid interstate insurance? The authoritative adjudications of this court forbid the idea. Again, the time may come when lotteries will be as popular as insurance contracts now are, or as popular as lotteries were when the Constitution was adopted. Would the court, in that event, be prepared to overrule the decision which the government now asks it to render?

As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious but worthy of encouragement. Revenue for the support of the state governments, of colleges and churches and other public enterprises, at that time was derived from lotteries. In adopting the Constitution, was it the intention or understanding of the people of the respective states to grant to the federal government the power to prevent the states from using lotteries among themselves as a source of state revenue, if they saw fit so to do? If the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is to-day,[1] and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void because it was not a regulation of commerce, but an unwarranted interference with the police power reserved to the states.

[1] Thayer, Cases on Const. Law, vol. iv., p. 1772.

II.

The argument on behalf of the United States as to the scope of the word *intercourse*, found in some of the opinions of the court, tends to prove altogether too much. It would make the power to regulate commerce embrace not merely "the entire sphere of mercantile activity in any way connected with trade between the states," but all the relations of life in so far as they involved intercourse between residents of different states. Such an argument, it is submitted, is completely answered by the language of Mr. Justice White in the *Hooper* case, *supra* (155 U. S. 648, 655), viz.:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature."

It cannot reasonably be assumed that the court in the *Hooper* case did not distinctly appreciate that the policies of insurance were sent or caused to be carried from one state to another and that the contract of insurance constituted intercourse between citizens of different states. But insurance, which has been authoritatively declared by this court not to be a branch of interstate commerce, although concededly an incident of commercial intercourse, could not become commerce merely from the fact that the insurance policy happened to be transported from one state to another by a common carrier for hire. The mere fact or method of carriage was considered in the insurance cases to be wholly immaterial, and the

determining factor was the real nature of the document itself.

The appellants do not dispute the proposition that the business of carriage for hire from one state to another or of facilitating such transportation or the transit of persons is a branch of interstate commerce within the authority of Congress to regulate, but it does not follow that Congress may, therefore, determine what may or may not be carried, irrespective of the nature of the thing carried. The contention seems to be that because the business of carrying persons, commodities, things and papers from one state to another constitutes a component part of interstate commerce, everything carried becomes *ipso facto* interstate commerce which Congress has power to prohibit. If such a broad power exists, it would, as we have seen, draw within the domain of the national government not only the regulation of interstate commerce, but of all intercourse, whether or not related to interstate commerce. It would enable Congress to regulate or prohibit every form of domestic intercourse and contractual relation between residents of different states, and to prohibit the transfer of promissory notes, of deeds, of bonds, of contracts for personal service, etc., etc. It is submitted that no such power was intended to be delegated to Congress by the grant of authority to regulate commerce among the several states.

Even if we concede, for the sake of argument, that the power to regulate interstate commerce involves the power to prohibit the transportation or transfer of articles of commerce which are in themselves injurious to interstate commerce, the argument of the government is not

advanced. For, if the Constitution delegated to Congress the express power to prohibit interstate commerce, that grant would not confer the power to prohibit directly or indirectly what was not interstate commerce. If Congress may prohibit the transportation of diseased animals or infected goods or obscene literature, it is because they are essentially commercial in their nature, and hence they are dealing with subjects of commerce. Such prohibition may be necessary and proper in order to protect the instrumentalities of interstate commerce and to safeguard such commerce. But this would not sanction the prohibition of things not constituting commerce, any more than Congress could forbid a citizen to go from one state to another on any business he saw fit and whatever his purpose might be. Thus, whilst it might well be recognized as necessary and proper to exclude diseased persons from railroads or steamboats, an entirely different proposition would be presented if an attempt were made to exclude persons in good health simply because they were going from one state to another to engage in the lottery business, which might be sanctioned and permitted by the laws of the states from and to which they were going.[1] Here, the lottery ticket is harmless and also worthless as a thing; it only becomes *malum prohibitum* because the local laws condemn the contract which it represents.

The following proposition submitted by the United States should be carefully considered (revised brief, p. 39) viz.:

> "*A fair test of the soundness of appellants' contention is to ask whether the State of Cali-*

[1] *Crandall* v. *Nevada*, 6 Wall. 35, 44, 48; *Slaughter-House Cases*, 16 Wall. 36, 75, 119; *Passenger Cases*, 7 How. 283, 492.

fornia could lawfully have passed a law taxing the transportation of the box of lottery matter from Dallas, Tex., to Fresno, Cal., or could the state of Ohio have taxed the carriage of the policy ticket from Newport, Ky., to Cincinnati, Ohio. Their impotence to do so is predicated on the theory that such carriage is commerce."

It would indeed be difficult to bring the question before the court more sharply than by means of the test thus stated. Concededly, the state could not tax the transportation of the box of lottery matter from one state to another, because that would be taxing the business of interstate commerce and not because it would be taxing lottery tickets as such. But does the government mean to suggest that an act of the State of California prohibiting the sale of lottery tickets would be absolutely void as a regulation of commerce? Yet, unless the doctrine of *Leisy* v. *Hardin*, *supra*, is to be overthrown, such an act would clearly be unconstitutional if lotteries are a branch of commerce, as argued by the government. Does the government seriously advance the proposition that, under the power to regulate commerce, Congress may sanction the sale of lottery tickets in any state notwithstanding the police laws of that state prohibit such sales, on the theory that it would be a regulation of commerce? If this contention be sound, then the laws now on the statute books of the states which absolutely prohibit the sale of lottery tickets are unconstitutional and void because a prohibition of interstate commerce!

Whilst the state is concededly impotent to tax the business of interstate carriage for hire of lottery tickets,

that fact does not in any degree militate against its power to tax or prohibit dealings in lottery tickets under the exercise of its reserved powers.

And the same may be said of that part of the argument in the revised brief of the government to the effect that the court cannot say that lottery tickets are not articles of commerce because Congress has seen fit to regulate them. It cannot, of course, be maintained that Congress, by its mere declaration that a lottery ticket or insurance policy constitutes a part of interstate commerce, can draw to itself the power to regulate and suppress the business of lotteries and insurance.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, is strongly relied on by the government to support the alleged absolute prohibitive power of Congress in respect of interstate commerce. The extract quoted merely shows that Congress has power to prohibit the making or the performance of any contracts between individuals and corporations which directly and substantially regulate to a greater or less degree commerce among the states. It must be quite apparent that such a power is not only proper but absolutely necessary for carrying into execution the power of Congress to regulate interstate commerce; for, otherwise, the regulation of individuals and corporations might exclude or nullify any regulation by Congress. This, however, is widely different from an attempt to prohibit contracts which do not relate to interstate commerce. The court expressly reaffirmed the case of *United States* v. *E. C. Knight Co.*, *supra*, and clearly did not intend to limit the doctrine of that case.

III.

Recurring again to the suggestion that *commerce* means *intercourse* in the broadest sense of that term, and includes all forms of transactions or intercourse among the people of the several states,[1] it will be assumed that if the word *commerce* was not intended to include all the significations and range of the word *intercourse*, then no argument will be approved which seeks to urge upon this court the proposition that it is within the judicial province to interpolate or substitute in place of *commerce* the word *intercourse*, which the framers of the Constitution, in their wisdom, saw fit not to use or insert. The word *intercourse*, in one of its significations or aspects, may well briefly describe commerce; yet, obviously, all intercourse is not commerce. Nor is there any warrant for the contention that Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, or this court in later cases, defined the word *commerce* as embracing all the meanings of the word *intercourse*. What has been ruled is, not that *commerce* is the equivalent or synonym of *intercourse*, but that commerce is synonymous with "*commercial* intercourse," which no one could dispute. As Chief Justice Marshall said in that famous case (p. 189):

> "The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit

[1] See remarks of Chief Justice Taney in note to *Passenger Cases*, 7 How. at p. 492.

> it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the *commercial* intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on *that* intercourse."

It is always necessary to bear distinctly in mind that, when adopting the Federal Constitution, the people of the United States deliberately "reserved to the states respectively or to the people" many objects which might have been appropriate for federal legislative action. The practical experience of our own times may lead us to regret that fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight which would have extended and not curtailed the powers of the national government. But the general power to punish for crimes in connection with many matters which were or might become of national interest or concern was intentionally withheld. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and suppression of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. It was then and may now be most desirable that lotteries, insurance,[1]

[1] *Hooper* v. *California*, 155 U. S. 648.

frauds,[1] negotiable instruments, trade-marks,[2] dealings in bills of exchange,[3] divorces, the manufacture of explosives and inflammable oils,[4] the inspection of slaughtering and packing,[5] emigrant agencies,[6] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects might tend to simplify, accommodate and protect interstate intercourse. But the power was not conferred; and conservatism has thus far restrained us from amending the Constitution. Until it is amended, the courts must enforce the fundamental law as it is and not as we might wish it had been. However desirable or however necessary federal power in any case may now seem to be, if it was not expressly conferred upon Congress, it cannot be read into the Constitution by legislative declaration or by judicial decree. The Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[7] It is to-day what it was when Hamilton and Madison and Jay and Marshall wrote and argued in its support. The surrounding circumstances have changed, usages of life and trade and modes of thinking have changed, the manners and morals and ideas of the functions and ends of government, conceptions of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions

[1] *United States* v. *Fox*, 95 U. S. 670.
[2] *Trade-Mark Cases*, 100 U. S. 82.
[3] *Nathan* v. *Louisiana*, 8 How. 73.
[4] *United States* v. *Dewitt*, 9 Wall. 41.
[5] *United States* v. *Boyer*, 85 Fed. Rep. 425.
[6] *Williams* v. *Fears*, 179 U. S. 270, 277.
[7] See *Ex parte Milligan*, 4 Wall. 2, 120, and *In re Debs, Petitioner*, 158 U. S. 564, 591.

of society are evolving; systems of municipal law are being altered incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when it was adopted. We are not at liberty to give the provisions of the Constitution new meanings because of considerations of expediency. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

A suggestion was made on the prior arguments that the state laws had been found to be ineffective for the suppression of lotteries, and that this court should, therefore, strain to sustain any federal legislation which was necessary or expedient to cope with the assumed evil. This is a suggestion which, even if true, should not be pressed. It is confidently submitted that present expediency or public necessity cannot expand the commerce clause or change its original scope and meaning. If the suppression of lotteries was exclusively within the province of the police power of the states according to the true interpretation of the Constitution, as understood at the time it was adopted, no present expediency or necessity can justify extending the commerce clause to cover it. If such an argument could be adopted, in its last analysis it would vest in Congress power to legislate in all criminal matters whenever the state laws were not duly enforced as to any acts or transactions arising from or affecting directly or indirectly intercourse among the inhabitants of the several states.

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[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

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An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of mere evidences of contracts which do not in their nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to carry out effectively the express grant of the power to regulate interstate commerce. The suggestion has been made that, if the present legislation be not sustained, Congress will be denied the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures. The answer is that all these constitute primarily articles of commerce and that, having the power to regulate commerce in such commercial articles, Congress may prohibit the carriage or transfer of such as will tend to injure interstate commerce. They come within the range of the power of Congress, because their interstate transportation may tend to affect interstate commerce. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of recognized articles of commerce should or should not be compulsorily brought into a state. But it would be stretching the language of the Constitution to an extreme which, it is submitted, the court has not sanctioned, to hold that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any

fair sense and which are within the police power of the states to prevent or prohibit.

The government urged on the prior argument that because most lottery tickets are made payable to bearer and pass by delivery, the decision might be placed upon the ground that lottery tickets were commercial commodities. But, of course, lottery tickets are mere evidences of a promise to pay upon the result of chance. This contention, moreover, involves the concession that such transactions would change their essential nature and the power of Congress cease if the mode of doing business were altered and lottery tickets were no longer made transferable by delivery but were confined to the individual first purchasing, with whom a personal contract was made! The policy slips that Francis caused to be carried from Covington to Cincinnati were not negotiable or transferable by delivery. Such a ground of decision would be entirely too narrow, and, moreover, would be very easily circumvented. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is notoriously done on the race track), and then transfer from state to state only the advertisements and circulars and the notices of drawings.[1]

It has been held by this court in the case of *In re Rahrer*, 140 U. S. 545, that Congress may, as to any article of commerce, ordain, that as soon as it comes within the state, even in its original package, it shall become subject to the operation of the police laws of that state together with other similar property within

[1] *France* v. *United States*, 164 U. S. 676, 682.

the borders of the state, and it has been suggested that this decision involves the proposition that Congress can practically prohibit interstate commerce in any article of commerce by permitting the states to interfere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. It must be evident that there is a radical difference between an act of Congress which declares that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another. The one would freely permit transportation and fully recognize the reserved powers and rights and wishes of the states; the other would absolutely prevent transportation and interfere with the police power of the states to permit or to prohibit as they might see fit. One state may desire to encourage what another wishes to prohibit; in one locality a certain article, *e. g.*, intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the *Rahrer* case, 140 U. S. 545, shows that it was by no means the idea in that opinion that Congress might prohibit all interstate traffic in liquors. On the contrary, as Mr. Chief Justice Fuller said of the legislation then in question (at pp. 561 and 564):

> "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to

> exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

It must be evident that any attempt by Congress to prohibit interstate traffic in liquor, notwithstanding the wishes of the various states and their local preferences, would be a departure which would cause much astonishment and opposition and be of doubtful constitutionality because of interference with the rightful jurisdiction of the states, whilst the legislation discussed in the *Rahrer* case involved the exercise by Congress of a power which recognizes to the fullest extent the jurisdiction of any state to permit or prohibit, according to its local policy.

In connection with this point may be mentioned a legislative episode of 1836, in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[1] In many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[2] The general im-

[1] 49 Niles' Register, 228.

[2] North Carolina, 1830, Laws, vol. 14, p. 10, and Maryland, 1831: 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

pression which prevailed in the South was that these regulations applied even to the United States postmasters, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster-General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[1] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails any anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, and that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[2] Buchanan placed his support of the bill on broader grounds, namely, that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incen-

[1] 48 Niles' Register, 447–448; 49 Niles' Register, 7–8.
[2] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

diary.[1] The opposition to the bill was based upon constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts[2] and by Webster.[3] On the 8th of June the bill was rejected by a vote of 25 to 19.[4]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that, if Congress could not regulate this matter indirectly through the mails, it could not regulate it at all; and no suggestion was ever made that such a bill could be passed under the commerce clause.

IV.

The entire argument on behalf of the United States, as to the extent of the commerce power of Congress, is crystalized in a series of propositions which it proposes to test by the answers to be given to the following questions propounded on page 63 of the revised brief:

> "If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?"

[1] Cong. Globe, 24th Cong., 1st Sess., App. 454.
[2] " " " " 348.
[3] " " " " 453.
[4] " " " " 539.

To the question, why may not the prohibitive power exercised in respect of foreign nations be applied to interstate commerce, and to the question why the same prohibitive power exercised in regulating trade with the Indian tribes may not be applied to interstate commerce, it should be sufficient to answer that there is nowhere in the Constitution or any of the amendments thereto a reservation of police powers or of any power either to any foreign nation or to any Indian tribe, and, therefore, the power of Congress over commerce with both is exclusive and absolute. Particularly as to the power of Congress over commerce with Indian tribes, if any further answer be necessary, it is found in the case of *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, overlooked by the government in its discussion of this point, where Mr. Justice Davis, delivering the unanimous opinion of the court, said:

> "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate and dependent.' Accordingly, treaties have been made and laws passed separating Indian territory from that of the states, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."

If any further answer be necessary as to the difference between the extent of the power to regulate com-

merce with foreign nations and that among the several states, we may refer to the historical matter quoted in the government's revised brief (pp. 54–59), which conclusively shows that the conditions existing between the United States and foreign nations at the time of the adoption of the Constitution called for the exercise of very different powers. Thus, on page 58, is italicized an expression of Edmund Randolph, "*that until exclusion shall be opposed to exclusion, and restriction to restriction*, the American flag will be disgraced." It is confidently submitted that no argument is needed to show that, while commercial reprisals may be necessary as national expedients, such considerations can never be permitted to govern the action of Congress in regulating commerce among the several states. 2 Tucker on Constitution, 528–533. *Groves* v. *Slaughter*, 15 Peters, 449, 503; *Passenger Cases*, 7 How. 283, 406. Indeed, the clause guaranteeing the privileges and immunities of citizens would probably be held to nullify any such attempt of Congress. *Passenger Cases*, *supra*, at p. 492; *Crandall* v. *Nevada*, 6 Wall. 35, 44, 48; *Slaughter-House Cases*, 16 Wall. 36, 75, 119.

The insurance cases present a striking example of the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress by treaty to provide that foreign insurance companies should be permitted to enter and do business in the United States and to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would

have no power whatever to regulate the business of interstate insurance or to compel a state to permit the residents of other states to transact an insurance business on the ground that it was a part of interstate commerce. In the one case the treaty power would be ample; in the other, the commerce power would be insufficient.

The misconceived idea that the power to prohibit importations of lottery matter from abroad would be necessarily denied if the interstate feature of the federal anti-lottery legislation now in question were not upheld, seems to have unduly impressed or influenced the court below in the *Francis* case, if, indeed, the idea did not mislead it (record in No. 80, p. 365; 106 Fed. Rep., p. 903).

The whole power to regulate every form of relations and intercourse with foreign countries resides in the sovereign national power created by the Constitution of the United States;[1] and every manner of intercourse in its broadest signification, whether commercial intercourse or otherwise, is to be regulated, permitted or prohibited by Congress alone.

The source and scope of this power to regulate international commerce are, in their very nature, essentially different from the source and scope of the power to regulate domestic commerce. In the case of international commerce, there is no limitation whatever upon the power of Congress and no implied or reserved power in the states. In the case of internal or interstate commerce, the only power Congress exercises is that expressly delegated, and that power is

[1] *Head Money Cases*, 112 U. S. 580, 591.

hedged in and circumscribed by the local police and municipal powers expressly reserved to the states. When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but likewise on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. It is essentially the exercise of a political administrative act. But when considering a statute regulating internal or interstate commerce, the exercise of power in the given case is limited to that expressly granted, and must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively, or to the people" [1]—considerations and limitations which have no weight in regulating foreign affairs.[2] In regulating what is generally termed international commerce and intercourse, Congress must, of necessity, have ample power to prevent the introduction of foreign lottery matter, and, in order to render such inhibition effective, it must have power to prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or carriage or transfer of smuggled imports or contraband goods even from point to point within a state. But many of the considerations which are of a national character and which arise between the

[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9 pp. 250, 258, 262.

United States, as a nation, and foreign nations wholly disappear when interstate relations are contemplated.

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities, or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion need not be challenged in the slightest degree. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon foreign ships or manufactures,[1] we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much the sovereign's prerogative as the power to make treaties giving to foreigners the privilege of abiding or

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 712; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty under the treaty power has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are expressly forbidden to enter into any form of treaty.[1]

The power to regulate commerce among the several states, it is true, is given in the same section and in the same language as the power to regulate foreign or international commerce, but the scope of the power is not the same in both cases and may not be exercised to the same extent. The same terms in relation to separate subjects frequently differ in meaning and scope.

Conclusion.

For these reasons, it is submitted that that portion of the act of Congress of March 2, 1895, which prohibits the causing of lottery tickets to be carried from one state to another should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of lotteries must be held to be within the police power of the respective states to permit or prohibit as local public policy may dictate.

Washington, October Term, 1902.

William D. Guthrie,

Of counsel for appellant Champion.

[1] Section 10 of Article I of the Constitution of the United States.